

criminals (and terrorists) possess the latest technologies, commenters asserted that they must have broadband wireless communications capabilities, including "the ability to encrypt the transmission."⁴⁶ Although utilities were aware that their monitoring systems needed encryption as early as 1998,⁴⁷ the "devices deployed now lack the memory and *bandwidth* to use techniques such as "integrity checks." Thus, many utility systems "lack even rudimentary security."⁴⁸

Recent reports have magnified concerns about cyber attacks by terrorists on utilities, particularly electric generation and transmission, water storage and distribution, nuclear power plants, and gas facilities.⁴⁹ In the last six months, cyber attacks have increased twenty-eight percent worldwide and highlight "the growing attraction of large, critical service providers."⁵⁰ For example, "[s]eventy percent of the power and energy companies under review [in a report released July 8, 2002] suffered at least one severe attack during the first six months of 2002"⁵¹ Experts predict that cyber attacks will ultimately focus on obtaining control over the digital devices used by utilities to control power grids and gas pipelines, such as SCADA systems.⁵² Thus, like Public Safety entities, utilities' communications systems now require greater security, which would be available if they have access to broadband communications.

⁴⁶ *IACP Comments* at 3; *see Major Cities Chiefs Comments* at 2-3; *Motorola White Paper* at 5; *APCO Comments* at 6; *Major County Sheriffs' Ex Parte* at 2.

⁴⁷ *Id.* at 11.

⁴⁸ *Id.* (emphasis added).

⁴⁹ Michael Barbaro, *Internet Attacks on Companies Up 28 Percent, Report Says*, WASH. POST, July 8, 2002, at E05; Barton Gellman, *Cyber-Attacks by Al Qaeda Feared: Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say*, WASH. POST, June 27, 2002, at A01.

⁵⁰ Michael Barbaro, *Internet Attacks on Companies Up 28 Percent, Report Says*, WASH. POST, July 8, 2002, at E05

⁵¹ *Id.*

⁵² *Id.*

Finally, utilities require broadband spectrum because they must cooperate with traditional Public Safety entities during emergencies by transmitting data and video. For example, the *USAT Final Report* noted that "automatic aid agreements with public safety agencies could often require quality video/imagery of incident scenes for utility command personnel" ⁵³ In addition, the *NTIA Report* found that, when responding to an emergency, utilities require reliable real-time voice communications with Public Safety personnel in order to coordinate their activities. ⁵⁴ This coordination is particularly important because utilities often must act before traditional Public Safety entities may respond to the emergency. For example, fire fighters require the utility to shut off the electricity and gas to any burning structure. Otherwise, the live electrical wires pose a dangerous risk to the firefighters because the water they use to douse the flames conducts electricity, and the presence of natural gas could lead to extreme combustion and/or explosion.

III. THE FCC SHOULD DEFINE ELIGIBILITY FOR THE 4.9 GHZ BAND TO INCLUDE UTILITIES

Because Public Safety and critical infrastructure entities share the same broadband spectrum needs, Cinergy and Consumers recommend that the FCC adopt an eligibility standard that permits them to hold licenses in the 4.9 GHz band. Although Cinergy and Consumers agree with the FCC that "the 4.9 GHz band is not subject to any statutory restrictions on eligibility to operate on the band," a more inclusive interpretation of the term "Public Safety" would be consistent with the Communications Act. In addition, a broad interpretation would advance the

⁵³ *USAT Final Report* at 10.

⁵⁴ *NTIA Report* at 3-8.

public interest and would accord with the changed circumstances following the events of September 11th⁵⁵.

A. The Communications Act Supports a Broad Interpretation of the Term "Public Safety"

In its *FNPRM*, the FCC suggested that it could base the eligibility standard either on the broad definition of "public safety radio services" in section 309(j)(2) or on the narrow definition of "public safety services" in section 337(f).⁵⁶ Cinergy and Consumers believe that the FCC should apply the broad definition in section 309(j)(2), thus extending eligibility to the widest variety of entities.

1. The FCC Should Apply the "Public Safety" Definition in Section 309(j)(2) of the Communications Act to Determine Eligibility for the 4.9 GHz Band
 - a. The Application of the "Public Safety Radio Services" Definition in Section 309(j)(2) Would Extend Eligibility to Critical Infrastructure Industries, Including Utilities Such as Cinergy and Consumers

The broad definition of "Public Safety" in section 309(j)(2) includes critical infrastructure industries. Under section 309(j)(2), "public safety radio services" are services, "*including private internal radio services used by State and local governments and non-government entities . . . that (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public.*"⁵⁷

The legislative history confirms that this definition of "public safety" is intended to encompass critical infrastructure industries. The Conference Report to this provision expressly states that section 309(j)(2) covers "'private internal radio services' used by *utilities*, railroads,

⁵⁵ *Second Report and Order and FNPRM*, 17 F.C.C. Rcd. 3955 ¶ 32.

⁵⁶ *Id.* ¶ 31.

metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments.”⁵⁸

Based on the plain language of the statute, as well as the legislative history, Congress clearly intended to include non-commercial use by utilities in its definition of “public safety radio services.”

b. Section 309(j)(2) Contains Generally Applicable Definitions

A broad eligibility standard is consistent with the general applicability of section 309(j)(2) definition of “Public Safety” to license applications. Unlike section 337(f), section 309(j)(2) applies to all applications for FCC radio licenses. Because section 309 applies to all radio licenses, its provisions govern the licensing of the 4.9 GHz band for public safety use (if only to exclude the band from the competitive bidding requirement). Thus, the FCC should apply the definition of “public safety” contained in this section to determine the eligibility standards for this band.

2. The Communications Act Does Not Mandate the Use of Section 337(f) to Determine Eligibility for the 4.9 GHz Band

Cinergy and Consumers oppose the application of section 337(f) as the eligibility standard for the 4.9 GHz band. Section 337(f) defines the term “public safety services” as services:

(A) the sole or principal purpose of which is to protect the safety of life, health, or property;

(B) that are provided –

(i) by State or local government entities; or

⁵⁷ 47 U.S.C. § 309(j)(2) (Supp. 2001) (emphasis added).

⁵⁸ House Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997), *reprinted in* 1997 U.S.C.C.A.N. 176, 192 (emphasis added).

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.⁵⁹

Cinergy and Consumers believe that the FCC should not apply the definition of "Public Safety" in section 337(f) to determine eligibility for the 4.9 GHz band because of its limited applicability. While section 309(j)(2) applies generally to issues concerning license applications, the definition of "public safety services" in section 337(f) only governs eligibility to use 24 MHz of the upper 700 MHz band. Congress enacted section 337(f) in the Balanced Budget Act of 1997, requiring the FCC to reallocate 24 MHz in the 746-806 MHz band to Public Safety licensees as part of the television broadcast migration from analog to digital transmissions.⁶⁰ By its own terms, however, the definitions in section 337(f) apply "*for purposes of this section.*"⁶¹ Thus, because this narrow definition of "public safety services" applies only to the 24 MHz of spectrum allocated in the upper 700 MHz band, the FCC should not use section 337(f) to determine eligibility for the 4.9 GHz band.

B. A More Inclusive Definition of "Public Safety" Would Advance the Public Interest

Cinergy and Consumers believe that the adoption of the more inclusive section 309(j)(2) definition of "Public Safety" as an eligibility standard would benefit the public interest by increasing spectrum efficiency and reducing the cost of equipment, in accordance with the FCC's

⁵⁹ 47 U.S.C. § 337(f)(1).

⁶⁰ *Id.* § 337(a)(1); In the Matter of Reallocation of Television Channels 60-69, the 746-806 MHz Band; ET Docket No. 97-157, *Report and Order*, 12 F.C.C. Rcd. 22953, 22958, 22960 ¶ 12-13 (1997).

⁶¹ 47 U.S.C. § 337(f) (emphasis added).

goals in this proceeding.⁶² The extension of eligibility to critical infrastructure industries, such as Cinergy and Consumers, would foster efficient use because of the presence of additional users. In addition, as mentioned above, critical infrastructure industries would use the 4.9 GHz band for day-to-day operations as well as emergency situations, thus decreasing the amount of time that the spectrum remains unused.

Although the FCC noted that congestion may arise with increased users, it stated that the proposed short-range communications in the 4.9 GHz band would enable "this spectrum [to] be reused for different operations at different locations in the same city, thus multiplying its utilization."⁶³ The FCC also stated that not "many locations [exist] at which mobile, incident-scene specific, use of the spectrum will be needed at any given time."⁶⁴ Cinergy and Consumers agree with the FCC that "the small service contour contemplated minimizes interference concerns."⁶⁵

A more inclusive definition of "Public Safety" will also reduce the cost of equipment for this band. In its *FNPRM*, the FCC noted that "the larger group of eligible users [would result] in . . . efficiencies of scale in the equipment market."⁶⁶ In their comments, Public Safety licensees and organizations also stated that the allocation of the 4.9 GHz band to Public Safety use would enable manufacturers to adapt existing equipment for the 5 GHz band, thus keeping equipment costs low.⁶⁷ Cinergy and Consumers agree that the inclusion of critical infrastructure industry

⁶² *Second Report and Order and FNPRM*, 17 F.C.C. Rcd. 3955 ¶ 34.

⁶³ *Id.* ¶ 26.

⁶⁴ *Id.* ¶ 39.

⁶⁵ *Id.* ¶ 50.

⁶⁶ *Id.* ¶ 34.

⁶⁷ *Major Counties Sheriffs' Ex Parte* at 2; *IACP Comments* at 3; *Major Cities Chiefs Comments* at 3.

entities in the definition of Public Safety would increase the demand for this modified equipment, further reducing its cost.

C. The FCC Should Use a More Inclusive Definition of Public Safety Because of the Changed Circumstances Following the Events of September 11, 2001

The FCC should also adopt broad eligibility standards for the 4.9 GHz band that include critical infrastructure industries in the definition of "Public Safety" because of recently changed circumstances. Specifically, the events of September 11th and their aftermath increased the importance of utility communications as a means of safeguarding the public.

The trend toward enhanced priority for utilities appears prominently in recent executive pronouncements, administrative agency recommendations, and FBI terror alerts. For example, President Bush's recent proposal for a Department of Homeland Security recognizes "that terrorists are capable of causing enormous damage to our country by attacking our critical infrastructure," including private electrical, nuclear, and gas providers.⁶⁸ The new Department will include a division on Information Analysis and Infrastructure Protection to protect these vital assets, systems, and functions.⁶⁹ Under the proposed legislation, this division will "tak[e] or seek[] to effect necessary measures to protect the key resources and critical infrastructures in the United States, in coordination with other executive agencies and in cooperation with . . . the private sector, and other entities."⁷⁰

NTIA echoed this emphasis on protecting critical infrastructure industries in its report on future utility spectrum needs, recommending that utilities receive preferential treatment from the

⁶⁸ President George W. Bush, *Department of Homeland Security* 8, 15 (June 2002) [hereinafter *Homeland Security Proposal*].

⁶⁹ *Id.*

⁷⁰ Homeland Security Act of 2002, H.R. 5005, 107th Cong. § 201(5) (2002).

FCC with respect to spectrum allocation because of their critical services.⁷¹ Specifically, the *NTIA Report* found that utilities provide a public service and are vital components of the Nation's critical infrastructure.⁷² Cinergy and Consumers strongly support these findings and believes that the *NTIA Report* accurately describes how the public benefits from utilities using spectrum for their private internal communications systems.

The *NTIA Report* recognized that utilities provide essential public services and are vital components of the Nation's critical infrastructure. Any "system disruptions that are not quickly restored pose potential threats not only to public safety, but also to the Nation's economic security."⁷³ By way of example, the Report cautioned that a disruption in a power generating station's control computer could be "just as devastating" to the Nation's economy as the September 11, 2001, terrorist attacks on the World Trade Center.⁷⁴ Furthermore, the President's Commission on Critical Infrastructure Protection was established because certain critical infrastructures, such as electrical power systems, are "so vital that their incapacity or destruction would have a debilitating impact."⁷⁵ Our Nation's "economic prosperity, and quality of life have long depended on the essential services" that utilities provide.⁷⁶

The recurring FBI terror warnings also illustrate that utilities are an inviting target for terrorist attacks.⁷⁷ In Afghanistan, the United States discovered that terrorists had diagrams of

⁷¹ *NTIA Report* at 3-3.

⁷² *Id.* at xvii.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Exec. Order No. 13010, 61 Fed. Reg. 37347 (July 17, 1996).

⁷⁶ President's Commission on Critical Infrastructure Protections, *Critical Foundations - Protecting America's Infrastructures* ix (Oct. 1997).

⁷⁷ Jayson Blair, *Post-9/11, Questions About Security at Electric Plants*, N.Y. TIMES, May 17, 2002; Robert Charles, *Priority Required for Protecting Utilities*, WASH. TIMES, Mar. 4, 2002, at

American nuclear power plants and public water facilities and had obtained information on how to program digital devices that control utility systems.⁷⁸ According to the Chief of Staff of the President's Critical Infrastructure Protection Board, "[a]n attack is a question of when, not if."⁷⁹ If the unthinkable occurred, large segments of the population could be put at risk and the economy could be devastated.⁸⁰ Although utilities have already enhanced security at their facilities, the federal government recently increased the state of alert at nuclear plants operated by utilities.⁸¹ To keep pace with a terrorist threat that possesses sophisticated technological equipment, critical infrastructure industries require access to broadband spectrum, such as that found in the 4.9 GHz band.

The lives of virtually everyone within a utility's service territory are affected by its operations. Without electricity or gas, other industrial and business operations simply cannot be performed. For the population as a whole, utilities have responsibility for providing electricity

A17; David Johnston and James Risen, *Seized Afghan Files Show Intent, Not Plans*, N.Y. TIMES, Feb. 1, 2002, at A13.

⁷⁸ Barton Gellman, *Cyber-Attacks by Al Qaeda Feared: Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say*, WASH. POST, June 27, 2002, at A01; David Johnston and James Risen, *Seized Afghan Files Show Intent, Not Plans*, N.Y. TIMES, Feb. 1, 2002, at A13.

⁷⁹ Barton Gellman, *Cyber-Attacks by Al Qaeda Feared: Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say*, WASH. POST, June 27, 2002, at A01.

⁸⁰ A recent column in the Washington Times by Robert Charles, counsel and staff director to the U.S. House National Security Subcommittee from 1995 to 1999, discussed the likelihood of utilities being "the next primary terrorist target" and the potential effects of terrorist attacks on utilities. Robert Charles, *Priority Required for Protecting Utilities*, WASH. TIMES, Mar. 4, 2002, at A17. Other columnists concurred, one quoting the chief of staff of the President's Critical Infrastructure Protection Board as stating that "[a]n attack is a question of when, not if." Barton Gellman, *Cyber-Attacks by Al Qaeda Feared: Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say*, WASH. POST, June 27, 2002, at A01.

⁸¹ Nuclear Plants Put on Higher Alert: Intelligence Did Not Specify Threat, Spokeswoman Says, ASSOCIATED PRESS, May 25, 2002.

and gas to critical facilities throughout their service territories. Therefore, it is necessary to take measures to ensure that utilities are able to continue their operations.

IV. THE FCC SHOULD ADOPT LICENSING AND SERVICE RULES TO COMPLEMENT THE ELIGIBILITY STANDARDS AND PROPOSED OPERATIONS

A. The FCC Should Permit Fixed Operations on the 4.9 GHz Band

The FCC should permit flexible use of the 4.9 GHz band by allowing mobile and fixed operations. In the *FNPRM*, the FCC solicited comment on the types of fixed operations that licensees would use in this band, such as "traditional point-to-point microwave operations, more advanced point-to-multipoint services, or temporary fixed links that would allow communication between, for example, an incident scene and police headquarters, or both."⁸²

Cinergy and Consumers believe that fixed operations are essential to implement many of the contemplated broadband uses of the 4.9 GHz band. As discussed in greater detail in Section II, utility workers would frequently require temporary fixed links between field crews and utility headquarters. A utility worker repairing electric lines could need advice from a supervisor at headquarters in order to complete the repairs quickly and efficiently. In addition, utilities would often require permanent, advanced, point-to-point operations to perform their proposed monitoring functions. For example, in the event of a natural disaster, utilities would need to have real-time video feedback from their substations to assess damages accurately and to dispatch field crews accordingly.⁸³

B. The FCC Should Limit the Use of the 4.9 GHz Band to Licensed Public Safety Entity Operations

⁸² *Second Report and Order and FNPRM*, 17 F.C.C. Rcd. 3955 ¶ 40.

⁸³ *USAT Final Report* at 10; *NTIA Report* at 3-22.

Although Cinergy and Consumers have not decided on an appropriate licensing scheme for the 4.9 GHz band, they are opposed to unlicensed use of the band and commercial use of the spectrum.

1. Blanket Licensing and Unlicensed Operations Are Not Appropriate for the 4.9 GHz Band

Public Safety and critical infrastructure industries could not use spectrum subject to blanket licensing or unlicensed use for their critical operations. Cinergy and Consumers agree with the FCC's concern "whether, in the absence of named licensees, there will be adequate mechanisms for ensuring that there will be proper coordination concerning communications among the various agencies that may respond to an incident or emergency."⁸⁴

Although unlicensed spectrum is available in the 2 and 5 GHz bands, utilities and Public Safety entities should not be required to conduct their critical communications on unlicensed spectrum that is subject to interference from other licensed or unlicensed devices or for which they could receive an order to discontinue operations at a moment's notice. As Public Safety commenters noted, unlicensed broadband spectrum, such as that in the 5 GHz band, is insufficient for these critical communications because of the "potential for interference from other licensed or unlicensed devices operating on the same or adjacent channels, or the possibility of delay or inability to transmit due to consumer peak usage."⁸⁵ Thus, because these same problems would arise in the 4.9 GHz in the absence of exclusive licenses, the FCC should not adopt a blanket licensing or unlicensed operation scheme.

⁸⁴ *Second Report and Order and FNPRM*, 17 F.C.C. Red. 3955 ¶ 51.

⁸⁵ *IACP Comments* at 3; *see, e.g., Motorola White Paper* at 5; *Major Cities Chiefs Comments* at 3 (requesting exclusive licensing); *Major County Sheriffs' Ex Parte* at 2; *IACP Comments* at 3.

2. The FCC Should Prohibit Commercial Operations on the 4.9 GHz Band

Cinergy and Consumers believe that the FCC should not license commercial entities in the 4.9 GHz band. In the *FNPRM*, the FCC requested comment on an approach that "would . . . allow commercial use in support of public safety in this band."⁸⁶ However, the FCC noted that commercial spectrum would fail to satisfy Public Safety needs because it is not immediately available and because commercial licensees would use it for Internet access.⁸⁷ APCO agreed that commercial services "generally do not provide immediate priority access, ubiquitous coverage, flawless reliability, or security features which are essential for such 'mission critical' public safety communications."⁸⁸

The *NTIA Report* reached the same conclusion with respect to the critical communications of utilities, finding that commercial spectrum would not be a feasible option because of the "unreliability due to limited coverage areas and frequent system saturation during peak hours and crisis situations."⁸⁹ In addition, "[t]here is no priority of service afforded to public safety agencies and energy providers when a commercial wireless network becomes saturated or a major service disruption occurs."⁹⁰ In any event, neither Cinergy nor Consumers is aware of any commercial service providers that could provide the specialized wireless broadband applications which have been identified with the 4.9 GHz allocation.

In addition, by prohibiting commercial operations on the 4.9 GHz band, the FCC would avoid the complicated licensing process necessary to auction spectrum to commercial users.

⁸⁶ *Second Report and Order and FNPRM*, 17 F.C.C. Rcd. 3955 ¶ 36.

⁸⁷ *Id.* ¶ 28.

⁸⁸ *APCO Comments* at 6.

⁸⁹ *NTIA Report* at 3-15.

⁹⁰ *Id.* at 3-16.

Section 309(j) requires the FCC to assign spectrum by competitive bidding, unless the prospective licensees are exempt under subsection (j)(2). In the *FNPRM*, the FCC acknowledged that "not all licenses would be exempt from auction" if it allowed commercial use in this band.⁹¹ If the FCC decides to license commercial entities in this band, it would have to develop a method of allocating spectrum among various applicants, some of which are subject to competitive bidding requirements and some of which are not. Therefore, the FCC should prohibit commercial use of the 4.9 GHz band.

C. The FCC Should Decline to Delegate Licensing Authority over the 4.9 GHz Band to States or Regional Planning Committees

The licensing of states or regional planning committees is also inappropriate for the 4.9 GHz band because no reason exists why a Public Safety agency should control access by critical infrastructure industries to communications facilities and spectrum that are necessary to fulfill their public service obligations. In the *FNPRM*, the FCC proposed that "[a] state-level agency or organization responsible for administering state emergency communications would be responsible for authorizing local and other public safety entities to operate on the spectrum and coordinating spectrum use."⁹² Alternatively, the FCC suggested that it could grant autonomy to Regional Planning Committees "to develop plans that meet their different communications needs."⁹³

Cinergy and Consumers believe that the involvement of these entities would implement an unnecessary layer of regulation. For example, the licensing of these entities would present numerous practical difficulties, creating unnecessary burdens for utilities seeking to use the 4.9

⁹¹ *Second Report and Order and FNPRM*, 17 F.C.C. Rcd. 3955 ¶ 45 n.11, 36-37.

⁹² *Id.* ¶ 47.

⁹³ *Id.* ¶ 53.

GHz band. Utilities would have to receive the permission of a state or local entity before acquiring the license. In addition, utilities would only receive conditional authority to operate in this band⁹⁴ and would automatically lose their ability to use the spectrum if the supporting governmental entity rescinds its authorization.⁹⁵

This conditional authority would adversely impact the utilities' regulatory and operational certainty. By forcing Cinergy and Consumers to cease their critical operations at a moment's notice at the whim of the state or local entity, the FCC would essentially impose secondary status on these entities.

If these critical infrastructure industries could lose their entire investment in a radio system and have vital communications terminated at the will of another entity, sound business practice would counsel against investing the money in the first place. This precarious position would dissuade these licensees from seeking licenses or from maintaining or upgrading their systems after receiving authorization. Thus, the delegation of authority to state or Regional Planning Committees would undermine the entire purpose of permitting utilities to use this spectrum.

Moreover, while utilities provide service in support of Public Safety, they are not generally regulated by state or local Public Safety agencies and have a separate, complementary mission to traditional Public Safety agencies. There is no compelling reason why a utility should be required to justify its need for spectrum to a state or local Public Safety agency or Regional Planning Committee comprised of such entities. Cinergy and Consumers therefore urge the FCC to permit direct licensing of 4.9 GHz radio systems by electric and gas utilities.

⁹⁴ 47 C.F.R. § 90.523(c); *Public Safety Service First Report and Order*, 14 F.C.C. Rcd. at 183 ¶ 58-59.

V. CONCLUSION

In conclusion, Cinergy and Consumers recommend that the FCC adopt an eligibility standard as well as licensing and service rules for the 4.9 GHz band to permit traditional Public Safety entities and critical infrastructure industries, such as utilities, to engage in their critical communications. These rules would permit these entities to perform their public services more efficiently and effectively, thus improving homeland security and protecting the lives and property of the public.

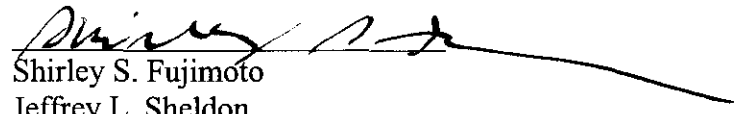
⁹⁵ 47 C.F.R. § 90.523(c); *Public Safety Service First Report and Order*, 14 F.C.C. Rcd. at 183 ¶ 58-59.

WHEREFORE, THE PREMISES CONSIDERED, Cinergy Corporation and Consumers Energy Company respectfully request that the FCC consider these Joint Comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

CINERGY CORPORATION
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Dated: July 8, 2002

CERTIFICATE OF SERVICE

I, Christine S. Bisio, do hereby certify that on this 8th day of July 2002, a copy of the foregoing "Joint Comments of Cinergy Corporation and Consumers Energy Company" was mailed via U.S. Mail, postage prepaid to each of the following:

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